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Nos. 130, 131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, Individually and as Members of the Civil Service Commission, *Petitioners*,

v.

JACK W. COHEN.

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, Individually and as Members of the Civil Service Commission, *Petitioners*,

v.

HARRY W. HUBICKEY.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

GERHARD A. GESELL,
JOHN P. FRANK,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The memorandum opinion of the District Court (R. 31-32) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 37-45) are reported at 160 Fed. 2d 915.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1947 (R. 46). Petitioner has invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether temporary members of the Coast Guard Reserve are entitled to preference in Federal employment as "ex-servicemen" within the meaning of the Veterans' Preference Act of 1944.

STATUTES INVOLVED

The relevant statutes are Section 2, Section 12, and Section 18 of the Veterans' Preference Act, Act of June 27, 1944, c. 287 Secs. 2, 12, 18, 58 Stat. 387, 390, 391 (5 U. S. C., Supp. V, §§851, 861, 867); and the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II §§207, 208, 55 Stat. 12, as amended (14 U. S. C. §§307, 308). They are printed in the appendix.

STATEMENT

These are actions for injunctions and for declaratory judgments to require the members of the Civil Service Commission to give these respondents "preference ratings" under the Veterans' Preference Act. Respondents are entitled to such ratings if they are "ex-servicemen" within the meaning of this statute. To appreciate the legal issue, a brief description of the duties of temporary members of the Coast Guard Reserve is necessary.

Temporary membership in the Coast Guard Reserve was authorized under Section 207 of the Coast Guard Auxiliary and Reserve Act (App. 11). These Reserv-

ists did harbor and coastal patrol duty and guarded factories where sabotage was feared (R. 13-14). The temporary reservists served part time: that is to say they normally served a minimum of 12 consecutive hours a week while continuing their regular employment. (R. 16) They were not exempted from Selective Service and could be drafted while performing their temporary Coast Guard duties.

In other respects, the temporary Reservists were full-fledged members of the military organization while on duty. They were enrolled by taking the usual military oath, they wore the uniform of the Coast Guard, they could give military orders appropriate to their rank, and they were subject to military discipline. (R. 7) They were immune to civil arrest for activities in the course of duty. *Brown* v. *Cain*, 56 F. Supp. 56 (E. D. Pa. 1944). Their status was clearly stated by the Government when it took them into service. Paragraph 4 of the document entitled "Enrollment and Active Duty Assignment" (R. 7) given temporary Reservists reads as follows:

> "Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended."

This temporary Reserve, recruited by strong appeal to patriotism, reached a membership of 70,000. (R. 12) The members averaged 40 years of age and thus were not usually subject to Selective Service. They were men who wanted to help win the war.[1]

Save for the satisfaction of a job well done, the service was completely unrewarding. The members received no compensation except a uniform allowance (R. 7). It was tough, dull, hard work to patrol the docks and harbors at least one full night a week for years on end. Many were injured and at least 39 died as a result of a frequently hazardous duty.[2]

Respondent Cohen was a temporary member of the Reserve serving from April 13, 1944 to September 5, 1945 and was on active duty on 58 days. (R. 14, 15) Respondent Hubickey was a temporary member from October 18, 1944 to September 30, 1945, serving on active duty 32 days. Cohen was a coxswain when disenrolled (R. 2) and Hubickey a seaman first class. (R. 20) Both were disenrolled under honorable conditions. (R. 8, 9, 20, 24).

At the same time, Cohen was a civilian economist with the War Department (R. 11) and Hubickey was a civilian naval architect with the Navy Department. (R. 20) Both were notified of discharges due to general reductions in force (R. 2, 20). They instituted these actions for the establishment of their veterans' preference. The District Court gave summary judgment for the respondents (R. 32, 33) and the Circuit Court of Appeals affirmed (R. 46) with Mr. Justice Edgerton dissenting.

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[1] House Report No. 1686, 78th Congress, 2d Session, H. R. 3704.
[2] Ibid.

REASONS FOR DENYING THE WRIT

I. The Decision Below Was Clearly Correct.

1. Section 2 of the Veterans' Preference Act gives preference to "ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war. . . ." The Coast Guard Reserve with which respondents served is a branch of the armed forces. Petitioner concedes the respondents served on "active duty" (R. 8). If respondents are "ex-servicemen", a term not explicitly defined in the statute, they are entitled to preference.

That the former members of the Reserve are ex-servicemen is so cogently shown by the Court below that it would be needless repetition to do more than respectfully refer the Court to the opinion of the Court of Appeals. Justice Prettyman's opinion shows that under *United States* v. *Tyler*, 105 U. S. 244 (1882) and the other cases in Justice Prettyman's fifth footnote, one is a "serviceman" who has taken the military oath, is subjected to military discipline, and is engaged in military duty. These things respondents have done.

The essence of the Government's argument is that the respondents were not sufficiently dislocated from their civilian lives to be entitled to the benefits of veterans' preference. As the Court below shows, the degree of dislocation is not a workable test for measuring the broad coverage of the Veterans' Preference Act. Concededly, the temporary Reserve members were less affected by the war than the men of Anzio. On the other hand, those who served for years in the temporary Reserve felt military service more than men released from service in the Army proper after a week or a month. Granting that Congress thought primarily of the overseas veteran in passing the Act, the Act none-

theless clearly covers millions who served in this country. The coverage of the statute must be measured by clear definable external circumstance such as the wearing of the uniform or the taking of the oath.

2. By virtue of Section 18, Section 2 cannot be construed to deprive respondents of preference eligibility. Section 18 (App. p. 10) provides that the Act should not be construed to deprive any "preference eligible" of "any rights heretofore granted to, or possessed by, him under any existing law, Executive Order, civil service rule or regulation, of any department of the Government or officer thereof." This provision operates to confirm rights existing at the time of the passage of the Act on June 27, 1944. As is shown by the opinion of Justice Prettyman, on April 4, 1944, the Civil Service Commission had issued a circular letter (number 4145) stating that temporary members of the Reserve were entitled to a veterans preference. (R. 3) The Veterans' Preference Act was itself adopted two months later while this regulation was outstanding and before the Commission changed its mind. We believed that under Section 18, the temporary members of the Reserve are entitled to the preference.

II. The Question Presented is Not Sufficiently Important to Warrant a Grant of Certiorari.

The question presented in this case has no general legal significance. It involves primarily the interpretation of one word in a statute with its own narrow legislative history. One can scarcely conceive of a case presenting a smaller legal point, or one of less general application.

Nor is there such factual significance that a determination by this Court is required. The Government

has made no showing that the question is important. It has asserted that it is "informally advised" that there were 125,000 temporary members of the Coast Guard Reserve. So far as this record shows, and so far as respondents know, the actual figure was about 70,000. (R. 12) But this is not an important case simply because a possible 70,000 persons may at one time have been members of the Reserve. The Government has made no showing, and respondents do not know, that any substantial number of persons once in that Reserve either are, were, or desire to be, Government employees.

Undoubtedly some number—we do not know how large—of temporary members of the Reserve may some time be affected by the Veterans' Preference Act. But of that number, all who have previously served in any Branch of service in the First World War or, in the case of the younger men, those who either before or after their Coast Guard membership were in other branches of the services during this war, will be unaffected by this decision. They will receive veterans' preference by virtue of their other, independent, veterans status.

If the problem is important enough to recur with frequency, it can easily arise in the Court of Claims, and this Court can await a conflict. Under Section 12 of the Veterans' Preference Act (App. p. 10), an ex-serviceman in Government employment is entitled to preference if the Government service is reduced. Any Government employee discharged in violation of a Civil Service statute can bring suit for salary in the Court of Claims, *United States* v. *Wickersham*, 201 U. S. 390 (1906), so long as he brings his claim within a reasonable time. *Nicholas* v. *United States*, 257 U. S. 71, and *Norris* v. *United States*, 257 U. S. 77 (1921). Under

earlier veterans' preference statutes, veterans did not have such a right to judicial review because of the great discretion left in the discharging official, *Keim* v. *United States*, 177 U. S. 290 (1900); but that discretion is explicitly eliminated by Section 12 of the Veterans' Preference Act of 1944 for all employees with an efficiency rating of "good" or better. For all such employees, the rule of the *Wickersham* case is thus now applicable; and this question may be put aside pending possible conflict with the Court of Claims.

In short, the petitioner has made no showing whatsoever that this is an important question by virtue of the number of persons who will be affected by it, or that there is any urgency for its decision by this Court now. Any conclusion that it is important is pure speculation.

CONCLUSION

Because the decision below was manifestly correct, and because there is no showing that the question presented is of any substantial importance, it is respectfully submitted that this petition for writs of certiorari should be denied.

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Attorneys for Respondents.

July 23, 1947.

APPENDIX

1. The pertinent portions of the Veterans' Preferance Act, Act of June 27, 1944, c. 287, Secs. 2, 12, 18, 58 Stat. 387, 390, 391 (5 U. S. C., Supp. V, 851, 861, 867), provide:

> Sec. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the War Department or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any

campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 13. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

2. The pertinent portions of the Coast Guard Auxiliary and Reserve Act, Act of February 19, 1941, c. 8, Title II, §§ 207, 208, 55 Stat. 12, as amended (14 U. S. C. 307, 308), provide:

> Sec. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.
>
> Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members

thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in section 214 and 215 of this title: *Provided,* That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated.